Supreme Court, U.S.
FILED

No. 941201 JAN 9 1995

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

KARL BLANKENBURG, JOHN CRUZ, CHARLES FURLOTTE, ROBERT KUSCHEL, JOSEPH LAUGHHUNN, ROBERT LEDBETTER, DAVID MARGOLIS, DAVID McEACHIN, ROBERT STEVENS, JEROME WILSON, ROBERT UDELL, present and former Trustees of the Pattern & Model Makers' Association of Warren & Vicinity Pension Fund (Defined Benefit) and MID-CONTINENTAL CLAIM SERVICE AND ADMINISTRATORS, INC., GARY NOVARA and LAWRENCE BRESKIN,

Petitioners,

vs.

GARY CORBIN, in his capacity as a Trustee and Fiduciary of the Pattern & Model Makers' Association of Warren & Vicinity Pension Fund (Defined Benefit),

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

LORREY MICHELA
Counsel of Record
NOVARA, TESIJA & MICHELA, P.C.
Attorneys for Petitioners
2000 Town Center
Suite 2370
Southfield, Michigan 48075
(810) 354-0380

6135
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTION PRESENTED

Did the Sixth Circuit Court of Appeals err in holding that despite the explicit standing requirements and jurisdictional framework of Section 502 of ERISA, the statute's "basic purpose" policy declaration and the relation back doctrine of Fed. R. Civ. P. 15(c) required the lower court to grant a Fed. R. Civ. P. 25(c) motion to substitute the "real party in interest" as party plaintiff, thus permitting a fiduciary who has lost standing during the pendency of an action to revive jurisdiction?

LIST OF PARTIES AND RULE 29.1 LIST

The parties to the proceedings below were the Petitioners Karl Blankenburg, John Cruz, Charles Furlotte, Robert Kuschel, Joseph Laughhunn, Robert Ledbetter, David Margolis, David McEachin, Robert Stephens, Jerome Wilson, Robert Udell, Mid-Continental Claim Service and Administrators, Inc., Gary Novara and Laurence Breskin.

The Respondent before this Court is Gary Corbin.

Petitioner Mid-Continental Claim Service and Administrators, Inc. has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 29.1.

TABLE OF CONTENTS

	Page
Question Presented	i
List of Parties and Rule 29.1 List	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	1
Statement of Jurisdiction	1
Statutes and Rules Involved	2
Statement of the Case	8
Reasons for Granting the Writ	11
I. The Sixth Circuit's application of the Fed. R. Civ. P. 15(c) "relation back" doctrine to jurisdictional determinations is a dangerous precedent which raises important and unresolved problems.	11
II. The Sixth Circuit's unwarranted construction of ERISA's explicit standing and jurisdictional requirements conflicts with the decisions of this Court and the Second and Fifth Circuits.	12
Conclusion	15

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Flournoy v. Trust Company of Columbus, 632 F.2d 461 (5th Cir. 1980) 14, 15

Mertens v. Hewitt Association, 113 S. Ct. 2063 (1993) 13, 15

Pressroom Unions - Printers League Income Security Fund v. Continental Assurance Co., 700 F.2d 889 (2nd Cir. 1983), *cert. denied*, 464 U.S. 845, 104 S. Ct. 148, 78 L. Ed. 2d 139 (1983) 14, 15

Statutes Cited:

28 U.S.C. § 1254(1) 2

29 U.S.C. § 186 8

29 U.S.C. § 1001(b) 2, 10

29 U.S.C. § 1132 .....i, 1, 8, 9, 13

29 U.S.C. § 1132(a) 3, 13

29 U.S.C. § 1132(e) 4, 14

29 U.S.C. § 1132(e)(1) 13, 14

Contents

Page

Rules Cited:

Fed. R. Civ. P. 12(b)(1) 1

Fed. R. Civ. P. 12(h)(3) 1, 12

Fed. R. Civ. P. 15(c) .....i, 5, 11, 12

Fed. R. Civ. P. 17(a) 6, 11, 12

Fed. R. Civ. P. 25(c) .....i, 2, 7, 9, 10, 12

Fed. R. Civ. P. 82 .....7, 10, 11, 12

APPENDIX

Appendix A — Opinion of the United States Court of Appeals for the Sixth Circuit Filed November 4, 1994 . 1a

Appendix B — Opinion of the United States Court of Appeals for the Sixth Circuit Filed August 2, 1993 .... 20a

Appendix C — Judgment and Order of the United States District Court for the Eastern District of Michigan, Southern Division Filed March 31, 1992 ..... 32a

Appendix D — Transcript of Proceedings Dated March 26, 1992 ..... 36a

The Petitioners, Karl Blankenburg, John Cruz, Charles Furlotte, Robert Kuschel, Joseph Laughhunn, Robert Ledbetter, David Margolis, David McEachin, Robert Stephens, Jerome Wilson, Robert Udell, Mid-Continental Claim Service and Administrators, Inc., Gary Novara and Laurence Breskin respectfully ask that a writ of certiorari issue to review the *en banc* judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered on November 4, 1994.

OPINIONS BELOW

The *en banc* opinion of the Court of Appeals for the Sixth Circuit is reported at 39 F. 3d 650, and is reprinted in the appendix p. 1a, *infra*.

The vacated panel opinion of the Court of Appeals for the Sixth Circuit is reported at 999 F.2d 1037, and is reprinted in the appendix, p. 20a, *infra*. The order for rehearing *en banc* is reported at 999 F.2d 1043, and is not reprinted herein.

The Judgment and Order Granting Defendants' Motion to Dismiss Claims of Plaintiff Pursuant to Fed. R. Civ. P. 12 (b)(1) and (h)(3), dated March 31, 1992, and the transcript of the hearing on Petitioners' motion to dismiss before the United States District Court for the Eastern District of Michigan, Southern Division (Woods, D.J.) have not been reported. They are reprinted in the appendix, pp. 32a, 34a and 36a, respectively.

STATEMENT OF JURISDICTION

Invoking federal jurisdiction under 29 U.S.C. § 1132, the Respondent filed suit in the Eastern District of Michigan, Southern Division in May 1991. By Judgment and Order dated March 31, 1992 the District Court granted the Petitioners' motion to dismiss for lack of subject matter jurisdiction. *See* pp. 32a and 34a, *infra*.

On Respondent's appeal, the Sixth Circuit on August 2, 1993 entered a judgment and opinion affirming the Eastern District's order. *See* p. 20a, *infra*. The Respondent subsequently filed a petition for rehearing and suggestion for hearing *en banc*, which was granted. On November 4, 1994, the Sixth Circuit *en banc* entered an opinion and judgment reversing the Eastern District's Order and directing that Respondent's motion for substitution of party plaintiff under Rule 25(c) be granted. *See* p. 1a, *infra*.

The jurisdiction of this Court to review the judgment of the Sixth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

(i) 29 U.S.C. § 1001(b):

> **Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries**
>
> It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(ii) 29 U.S.C. § 1132(a):

Persons empowered to bring a civil action

A civil action may be brought -

(1) by a participant or beneficiary -

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under Section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of [Section] 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary

(A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

(6) by the Secretary to collect any civil penalty under subsection (c)(2) or (i) or (l) of this section;

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 1169(a)(2)(A) of this title); or

(8) by the Secretary, or by an employer or other person referred to in section 1021(f)(1) of this title, (A) to enjoin any act or practice which violates subsection (f) of section 1021 of this title, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection.

(iii) 29 U.S.C. § 1132(e):

Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in Section 1021(f)(1) of this title. State courts of competent

jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(iv) Fed. R. Civ. P. 15(c):

Relation Back of Amendments. An Amendment [sic] of a pleading relates back to the date of the original pleading when

(1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or

(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or

(3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by

> Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.
>
> The delivery or mailing of process to the United States Attorney, or United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of subparagraphs (A) and (B) of this paragraph (3) with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

(v) Fed. R. Civ. P. 17(a):

> **Real Party In Interest**. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought; and when a statute of the United States so

provides, an action for the use or benefit of another shall be brought in the name of the United States. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest, and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

(vi) Fed. R. Civ. P. 25(c):

Transfer of Interest. In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule.

(vii) Fed. R. Civ. P. 82:

Jurisdiction and Venue Unaffected. These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. An admiralty or maritime claim within the meaning of Rule 9(h) shall not be treated as a civil action for the purposes of Title 28, U.S.C. §§ 1391-93.

STATEMENT OF THE CASE

Petitioners are 11 former union and management trustees of an ERISA multiemployer defined benefit pension plan, a collectively-bargained plan within the meaning of Section 302 of the Labor Management Relations Act, 29 U.S.C. § 186, as well as three service providers to said plan — a third-party administrator and two attorneys. Respondent is a former management trustee for said plan. Respondent filed a lawsuit in May 1991 alleging that Petitioners had engaged in certain conduct and activities which violated the fiduciary standards of ERISA.

When the suit was filed, three of the Petitioners — David Margolis, David McEachin and Jerome Wilson — as well as Respondent himself were current plan trustees.

On November 26, 1991, during the pendency of the lower court proceedings, Respondent submitted his letter of resignation to the pension plan's board of trustees, to be effective December 20, 1991. The resignation letter was accepted by the board, and became effective on the date indicated.

When Respondent resigned his trusteeship, there already existed another vacancy on the board among the management trustees. It was not until February 25, 1992 that one Paul Gard and another management trustee were seated on the board, having been selected by the signatory employers to fill the two existing vacancies.

In view of the resignation of Respondent, the Petitioners moved on March 19, 1992 for dismissal of the action on the grounds that the district court had lost subject matter jurisdiction concurrently with Respondent's loss of standing as a plan fiduciary. The Petitioners asserted that Section 502 of ERISA contains an exclusive grant of jurisdiction to the federal courts for

civil actions seeking to redress a breach of fiduciary duty. ERISA limits those persons empowered to maintain such an action to the Secretary of Labor, a participant, beneficiary or fiduciary. Since after his resignation the Respondent failed to qualify as one of the enumerated parties authorized to maintain an action under ERISA, the Petitioners argued that the district court had lost subject matter jurisdiction and, accordingly, the case should be dismissed.

Respondent responded to the motion to dismiss with a motion to add or substitute a party plaintiff, seeking to replace himself with one of the newly-seated management trustees, Paul Gard. While admitting that he had lost standing to proceed as the moving party in the action (*see* p. 40a, *infra*), Respondent argued that the substitution of trustee Gard would moot the standing issue, restore subject matter jurisdiction and permit the uninterrupted continuation of the proceedings. *See* p. 42a, *infra.*

It was the position of the Respondent that although he lacked standing as a fiduciary, there had been a "transfer" of his "interest" in the lawsuit to trustee Gard, since Gard had been selected to fill one of the vacancies that existed after the Respondent's resignation. The Respondent contended that this "transfer of interest" justified and compelled the substitution of trustee Gard as a party plaintiff pursuant to Fed. R. Civ. P. 25(c).

The Eastern District agreed that Respondent's resignation resulted in his loss of standing as one of the enumerated parties authorized to maintain an action under Section 502 of ERISA. As a consequence of Respondent's loss of standing, the Eastern District found that subject matter jurisdiction had also been lost and, therefore, dismissed the case.

In addition, the Eastern District rejected consideration of the addition or substitution of trustee Gard as party plaintiff because

(1) subject matter jurisdiction had been destroyed; (2) the Federal Rules of Civil Procedure could not be utilized to revive jurisdiction once it had been lost; and (3) in any event, there was no "transfer of interest" between Respondent and Gard within the meaning and intent of Fed. R. Civ. P. 25(c). *See* p. 43a, *infra*.

Following the dismissal of his case, the Respondent appealed as of right to the Sixth Circuit Court of Appeals. On August 2, 1993, a panel of the Sixth Circuit affirmed the Eastern District's ruling in a two-to-one opinion authored by Circuit Judge Celebrezze. *See* p. 21a, *infra*. Respondent timely requested rehearing by the court *en banc*, which request was granted, and the Sixth Circuit's *en banc* opinion — authored by Circuit Judge Nelson, the dissenter on the original panel — was issued on November 4, 1994. *See* p. 2a, *infra*.

At Respondent's urging, the Sixth Circuit *en banc* found that even though Respondent "ceased to be a real party in interest as of December 20, 1991, and thus had no standing to prosecute the action after that date" (*see* p. 9a, *infra*), "subject matter jurisdiction was not irretrievably lost the moment [Respondent] resigned his trusteeship." *Id.*

First relying on its notion of ERISA's "basic purpose" of "providing for . . . ready access to the Federal courts", as espoused in 29 U.S.C. § 1001(b) (*see* p. 7a, *infra*), the Sixth Circuit concluded that it just wouldn't "square with . . . legislative policy" (*id.*) to literally interpret ERISA's express standing and jurisdictional provisions; rather, the majority opined that Congress undoubtedly intended that a continuum of subject matter jurisdiction would exist between plan fiduciaries, despite an intermittent loss of standing. (*Id.*)

Secondly, the Sixth Circuit entirely disregarded the provisions of Fed. R. Civ. P. 82, a rule which prohibits a

manipulation of the Federal Rules of Civil Procedure to extend jurisdiction of the courts. According to the Sixth Circuit, since Fed. R. Civ. P. 17(a) does not permit the dismissal of a case simply because " 'it is not prosecuted in the name of the real party in interest' " (*see* p. 9a, *infra*), and a Rule 17(a) substitution has " '*the same effect as if the action had been commenced in the name of the real party in interest*' " (*id.*, emphasis in the original), the Sixth Circuit determined that it was perfectly acceptable — nay, *it was mandatory* — to permit Respondent to "moot" his standing problems and "recapture" subject matter jurisdiction by substituting in Paul Gard for himself. (*See* p. 10a, *infra*).

REASONS FOR GRANTING THE WRIT

I.

THE SIXTH CIRCUIT'S APPLICATION OF THE FED. R. CIV. P. 15(c) "RELATION BACK" DOCTRINE TO JURISDICTIONAL DETERMINATIONS IS A DANGEROUS PRECEDENT WHICH RAISES IMPORTANT AND UNRESOLVED PROBLEMS.

By imparting the "relation back" language of Fed. R. Civ. P. 15(c) onto Fed. R. Civ. P. 17(a) — and, by implication, Fed. R. Civ. P. 25(c) — in order to artificially maintain subject matter jurisdiction in this case, the Sixth Circuit has set a precedent which now *obliges* the judiciary to cure jurisdictional defects by relating a proposed successor's standing to the commencement of the suit — no matter what events have transpired in the interim.

The use of the Federal Rules of Civil Procedure to extend subject matter jurisdiction is strictly prohibited by Fed. R. Civ. P. 82. Nonetheless, the Sixth Circuit has decided that a district court *must* allow subject matter jurisdiction to be resurrected through a mandated substitution of party plaintiffs if the court had

jurisdiction when the suit was initially filed. This result not only defies the limitations espoused in Rule 82, but nullifies Fed. R. Civ. P. 12(h)(3), which *requires* a court to dismiss an action "*whenever* it appears . . . that the court lacks jurisdiction of the subject matter . . ." (emphasis added).

Simply stated, this case was dismissed by the Eastern District of Michigan for lack of subject matter jurisdiction, and *not* for failure of prosecution in the name of the real party in interest. Substitution could not, as observed by Circuit Judge Celebrezze, "cure the jurisdictional defect." *See* p. 14a, *infra*. Yet "cure" is what the majority dictates *must* occur.

Clearly, lower courts need guidance from this Court as to whether the application of the Rule 15(c) "relation back" doctrine to Fed. R. Civ. P. 17(a) and 25(c) to manufacture jurisdiction in this manner is appropriate.

II.

THE SIXTH CIRCUIT'S UNWARRANTED CONSTRUCTION OF ERISA'S EXPLICIT STANDING AND JURISDICTIONAL REQUIREMENTS CONFLICTS WITH THE DECISIONS OF THIS COURT AND THE SECOND AND FIFTH CIRCUITS.

On its own initiative, the Sixth Circuit has manufactured a concept of subject matter jurisdiction under ERISA which seemingly can be passed from plan fiduciary to plan fiduciary like a baton in a relay race. Even when the "baton" is dropped, the Sixth Circuit's rationale *mandates* that jurisdiction be saved by reaching out to another party. Such a bungling of ERISA's jurisdictional provisions violates conventional jurisprudence and deserves this Court's attention.

The reasoning employed by the Sixth Circuit in reaching its conclusion that ERISA's "basic purpose" policy statement controls the statute's jurisdiction and standing provisions directly conflicts with this Court's holding in *Mertens v. Hewitt Associates*, 113 S. Ct. 2063 (1993). In *Mertens*, this Court was asked to find that in light of ERISA's "basic purpose", Section 502(a)(3) authorizes suits for money damages against nonfiduciaries who knowingly participate in a fiduciary's breach of fiduciary duty. This Court rejected the contended interpretation, calling it "strained", and articulated that

> [V]ague notions of a statute's "basic purpose" are nonetheless inadequate to overcome the words of its text regarding the *specific* issue under consideration. [Citation omitted.] This is especially true with legislation such as ERISA, an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests — not all in favor of potential plaintiffs.

113 S. Ct. 2071, emphasis in the original.

The conflict between the principles espoused in *Mertens* and this case could not be more complete. The *specific* issue considered in this case was whether, in light of the explicit congressional grant of jurisdiction under 29 U.S.C. § 1132(e) (1) to only those parties listed in 29 U.S.C. § 1132(a), a loss of standing under subsection (a) resulted in the destruction of the district court's subject matter jurisdiction provided in subsection (e)(1). Disregarding the direct relationship between subsections (a) and (e)(1), the Sixth Circuit determined that despite the text of § 1132, ERISA's "basic purpose" would nonetheless permit it to conclude that a loss of standing under subsection (a) simply puts the subject matter jurisdiction provided in subsection (e)(1) into

the subject matter jurisdiction provided in subsection (e)(1) into an amorphous state of limbo until the "baton is passed" and subject matter jurisdiction is resurrected by motion under the Federal Rules of Civil Procedure.

This surprising result directly conflicts with the position of the Fifth Circuit, which has specifically acknowledged that

> Because standing is an element of the constitutional requirement of "case or controversy," *lack of standing deprives the court of subject matter jurisdiction* [citation omitted].

Flournoy v. Trust Company of Columbus, 632 F.2d 461, 463,. fn. 6 (5th Cir. 1980), emphasis added.

Equally in conflict with the decision below is *Pressroom Unions - Printers League Income Security Fund v. Continental Assurance Co.*, 700 F.2d 889, 890 (2nd Cir. 1983), *cert. denied*, 464 U.S. 845, 104 S. Ct. 148, 78 L. Ed. 2d 139 (1983). In *Pressroom*, the Second Circuit was asked to review a lower court's denial of a motion to substitute in a fiduciary breach action, where the substitution was sought to cure a jurisdictional defect, as it was here. When the lower court's subject matter jurisdiction was challenged because the plaintiff, a trust fund, was not a party authorized to maintain suit pursuant to 29 U.S.C. § 1132(e), a substitution of plan participants as plaintiffs was sought. Substitution was denied on the basis that *jurisdiction could not be created retroactively*, and that the motion sought "to substitute a *new action* over which *there* [was] *jurisdiction* for one where *it did not exist*. 700 F.2d 893, emphasis added.

In this case, the substitution sought by Respondent — and now *mandated* by the Sixth Circuit — did not simply correct a

"misnomer" of the proper party to prosecute the action, but instead *effected a substantive modification of a case over which the Eastern District of Michigan otherwise lacked subject matter jurisdiction!*

The Sixth Circuit has thus created a perverse precedent, likely to create a Pandora's box of confusion and conflict among the Circuits. It is a precedent directly at odds with the principles enunciated by this Court in *Mertens,* the Fifth Circuit in *Flournoy* and the Second Circuit in *Pressroom.* Plenary consideration of this case by the Court is essential to clarify the jurisprudential parameters of the federal courts.

CONCLUSION

On this Court rests the prime responsibility for the proper functioning of the federal judiciary. A grant of certiorari in a case such as this, which involves issues of federal jurisdiction and practice and procedure, reflects that responsibility. For all of the reasons herein, the petition for certiorari should be granted. If the Petitioners are correct in urging that subject matter jurisdiction cannot be "resurrected" once it has been extinguished, then the Sixth Circuit's holding should be reversed and District Court's Order and Judgment affirmed.

Respectfully submitted,

LORREY MICHELA
Counsel of Record
NOVARA, TESIJA & MICHELA, P.C.
Attorneys for Petitioners
2000 Town Center
Suite 2370
Southfield, Michigan 48075
(810) 354-0380

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED NOVEMBER 4, 1994

No. 92-1540

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GARY CORBIN,

Plaintiff-Appellant,

v.

KARL BLANKENBURG; JOHN CRUZ; CHARLES FURLOTTE; ROBERT KUSCHEL; JOSEPH LAUGHHUNN; ROBERT LEDBETTER; DAVID MARGOLIS; DAVID McEACHIN; ROBERT STEPHENS; JEROME WILSON; ROBERT UDELL, Present or Former Trustees of the Pattern & Model Makers Association of Warren & Vicinity Pension Fund (Defined Benefit); MID-CONTINENTAL CLAIM SERVICE AND ADMINISTRATORS, INC.; GARY NOVARA; and LAURENCE BRESKIN,

Defendants-Appellees.

ON APPEAL from the United States District Court
for the Eastern District of Michigan

Decided and Filed November 4, 1994

Before: MERRITT, Chief Judge; and CELEBREZZE, KEITH, KENNEDY, MARTIN, JONES, MILBURN, GUY, NELSON, RYAN, BOGGS, NORRIS, SUHRHEINRICH, SILER, BATCHELDER, and DAUGHTREY, Circuit Judges.

Appendix A

NELSON, J., delivered the opinion of the court, in which MERRITT, C. J., KENNEDY, JONES, MILBURN, GUY, RYAN, BOGGS, NORRIS, SUHRHEINRICH, SILER, BATCHELDER, and DAUGHTREY, JJ., joined. CELEBREZZE, J . (pp. 11-17) , delivered a separate dissenting opinion, in which KEITH and MARTIN, JJ., joined, with MARTIN J. (p. 18), also delivering a separate dissenting opinion.

DAVID A. NELSON, Circuit Judge. Where a trustee commences a lawsuit in his fiduciary capacity and later resigns from office, a successor trustee will normally be allowed to step into the plaintiff's shoes and take over the prosecution of the action; the resignation of the original trustee is not deemed to abate the lawsuit without possibility of revival. The question presented in the case at bar is whether the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, requires a different result with respect to trustees of employee benefit plans governed by that statute.

The district court answered the question in the affirmative. The present action, commenced in federal court by an ERISA trustee who was authorized by statute to bring the suit, was dismissed for want of jurisdiction following the trustee's resignation from office. Dismissal was ordered notwithstanding the pendency of a motion to substitute as plaintiff a successor trustee who was prepared to go forward with the litigation.

We think that the dismissal was unwarranted. ERISA, as we read it, does not mandate abatement of the action under the circumstances presented here. We shall therefore reverse the order of dismissal and direct that the successor trustee be substituted as plaintiff.

Appendix A

I

Alleging that he was a trustee of a defined benefit pension plan established in accordance with the requirements of §§ 402 and 403 of ERISA, 29 U.S.C. §§ 1102 and 1103, plaintiff Gary Corbin brought suit against a group of defendants that included, among others, nine former trustees and two current trustees. Mr. Corbin's complaint, which asserted claims for breaches of fiduciary duty that were said to have caused substantial losses to the pension plan, was filed in the United States District Court for the Eastern District of Michigan. Federal question jurisdiction was asserted on the basis of § 502 of ERISA, 29 U.S.C. § 1132, which authorizes ERISA fiduciaries to bring civil actions in federal court. After an amended complaint was filed, the defendants filed an answer in which they admitted plaintiff Corbin's status as a fiduciary and admitted that the district court had subject matter jurisdiction by virtue of ERISA.

The action was commenced in May of 1991. Extensive discovery proceedings ensued, and the defendants eventually filed a voluminous motion for summary judgment.

Effective December 20, 1991 — a date prior to the filing of the defendants' summary judgment motion — Mr. Corbin resigned his trusteeship. He was replaced in February of 1992 by a man named Paul Gard.

On March 19, 1992, the defendants moved to dismiss the complaint pursuant to Rules 12(b)(1) and 12(h)(3), Fed. R. Civ. P. The theory of the defendants' motion was that Mr. Corbin had lost standing to continue the lawsuit when he resigned as trustee and that the district court irretrievably lost subject matter jurisdiction once Mr. Corbin ceased to qualify, under 29 U.S.C. § 1132, as a person entitled to bring this type of action.

Appendix A

On March 24, 1992 — three working days after the filing of the defendants' motion to dismiss — Mr. Corbin moved to substitute Paul Gard as plaintiff. The motion was accompanied by an affidavit in which Mr. Gard swore that he had succeeded Mr. Corbin as trustee on February 25, 1992; that he (Gard) desired to pursue the allegations of the amended complaint on behalf of and for the benefit of the pension plan; and that he was prepared to act as party plaintiff. The defendants immediately objected to the substitution on the ground that there had been no "transfer of interest" from Corbin to Gard within the meaning of Rule 25(c), Fed. R. Civ. P., a rule that allows the court, upon motion, to direct substitution of the person to whom an interest has been transferred.

Two days after the filing of the motion to substitute Mr. Gard as plaintiff, the district court heard oral argument on the defendants' motion to dismiss. At the conclusion of the argument the court announced its decision from the bench. The gist of the court's oral ruling was that although Plaintiff Corbin had possessed standing to bring the suit in May of 1991, when he was still a plan fiduciary, he lost his standing as a fiduciary when he resigned his trusteeship the following December; that with the plaintiff's loss of standing, the district court immediately lost subject matter jurisdiction over the case; that the subsequent motion to substitute Mr. Gard as plaintiff should be "ignore[d]" by the court, notwithstanding that "Mr. Gard has standing under ERISA to bring a claim," because jurisdiction had been lost before Mr. Gard even became a trustee; that Rule 25(c) "cannot be used to restore jurisdiction once it is lost," *cf.* Rule 82, Fed. R. Civ. P., and the lawsuit was abated by Corbin's resignation unless the action was one that survived as a matter of substantive law, *cf. Hilbrands v. Far East Trading Co.*, 509 F.2d 1321, 1323 (9th Cir. 1975); and that while the court had "no quarrel" with *Blackmar v.*

Lichtenstein, 468 F. Supp. 370 (E.D. Mo. 1979), *aff'd*, 603 F.2d 1306 (8th Cir. 1979), where successor trustees were substituted as plaintiffs in a lawsuit that had been brought by a profit-sharing plan trustee prior to his removal as trustee, *Blackmar* was not dispositive because jurisdiction had not been predicated on ERISA there.[1] A written order of dismissal was entered on April 1, 1992, and the plaintiff perfected a timely appeal.

A divided panel of this court affirmed the dismissal. A petition for rehearing en banc was subsequently granted, the panel's judgment thereupon being vacated. The matter has been briefed and argued before the full court, and it is now ripe for decision.

II

If Gary Corbin had not been a plan fiduciary when this

---

1. The original complaint in *Blackmar* asserted four causes of action, two of which were based on federal securities law and the others of which were pendent claims for relief under state law. *See Blackmar v. Lichtenstein*, 578 F.2d 1273, 1275 (8th Cir. 1978). In granting the successor trustees' motion for substitution, the district court rejected an argument that the question of who the real parties in interest were was controlled by ERISA. See 468 F. Supp. at 374. The district court went on to say, however, that "[e]ven assuming . . . that ERISA did apply to the determination of the real party in interest, *the Court concludes that ERISA would not preclude substitution of movants herein*." *Id.* (emphasis supplied).

In affirming the order that substituted the successor trustees for Mr. Blackmar, the Court of Appeals for the Eighth Circuit noted that §502 of ERISA authorizes a fiduciary to sue for ERISA violations. 603 F.2d at 1310. The court of appeals went on to observe that "[o]nce Blackmar's successor trustees . . . were appointed, [Blackmar] ceased to be a fiduciary and no longer had the capacity to sue for violations which may have occurred under this title." *Id.* It was the loss of the original trustee's standing to sue that was held to justify substitution of the successor trustees as parties plaintiff.

lawsuit was originally filed, he would have had no authority to bring the action under ERISA in the first place. See *Pressroom Unions-Printers League Income Security Fund v. Continental Assurance Co.*, 700 F.2d 889,891-92 (2d Cir.), *cert. denied*, 464 U.S. 845 (1983), holding that an ERISA action may be brought only by a member of one of the categories of people (the Secretary of Labor, a plan participant, a plan beneficiary, a plan fiduciary, or (for suits against the Secretary) a plan administrator) specifically named in 29 U.S.C. § 1132. And if the action had been brought by a person not statutorily authorized to bring it, the absence of subject matter jurisdiction could not have been cured by substituting an authorized plaintiff for the unauthorized plaintiff. "The longstanding and clear rule is that 'if jurisdiction is lacking at the commencement of [a] suit, it cannot be aided by the intervention of a [plaintiff] with a sufficient claim.' " *Pressroom Unions*, 700 F.2d at 893 (quoting *Pianta v. H. M. Reich Co.*, 77 F.2d 888, 890 (2d Cir. 1935)).

In the case at bar, however, jurisdiction was not lacking at the commencement of the suit. As a plan fiduciary, Gary Corbin was unquestionably authorized by 29 U.S.C. § 1132(a) to bring the action. The district court unquestionably had subject matter jurisdiction *ab initio*, and the issue presented here was thus similar to that presented in *Blackmar v. Lichtenstein*, 603 F.2d 1306 (8th Cir. 1979): whether abatement of an action properly commenced by an employee benefit plan trustee is required when the trustee leaves office.

As far as what the Supreme Court has referred to as "the common law of trusts" is concerned, see *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570 (1985), it is hornbook law that an action brought by a trustee "is not ordinarily abated by his failure to continue in his office." 1 C.J.S., Abatement and Revival

§ 111(a). When a trustee party leaves office, "an action is ordinarily revived in the name of the successor representative." 1 Am. Jur. 2d, Abatement, Survival, and Revival, § 121. Congress could have prescribed a different rule for ERISA trustees, of course, but it did not do so. Nothing in 29 U.S.C. § 1132 or any other section of ERISA suggests that a civil action brought by an ERISA trustee is personal to the particular individual who held the office when the suit was filed and must therefore be abated, without possibility of revival in the name of another representative, when the original trustee leaves office.

The declaration of policy adopted by Congress in enacting ERISA indicates, on the contrary, that Congress would have looked askance at any abatement rule calculated to leave plan participants and beneficiaries high and dry if a plan trustee who has brought an action on their behalf against other fiduciaries subsequently leaves office for one reason or another. "It is hereby declared to be the policy of this chapter," Congress said in 29 U.S.C. § 1001(b), "to protect . . . the interests of participants in employee benefit plans and their beneficiaries . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." An abatement rule of the sort adopted by the district court in the instant case seems particularly difficult to square with the legislative policy where, as here, a new lawsuit commenced either by the successor trustee or by individual participants or beneficiaries suing in their own right would undoubtedly be met with a statute of limitations defense.[2]

---

2. The supplemental brief filed by the plaintiff after the granting of his petition for rehearing en banc states that "[b]y the time the district judge dismissed this action, the statute had run as to the bulk of the issues raised in the litigation." The defendants have never taken issue with this statement.

(Cont'd)

As emphasized by Justice Marshall, who wrote for the Supreme Court in *Central States,* Congress found that "the continued well-being and security of millions of employees and their dependents are directly affected by these [employee benefit] plans." 472 U.S. at 569 (quoting 29 U.S.C. § 1001(a)). Congress was concerned to see that workers who had obtained vested pension rights actually received what they had been promised, and to this end "Congress invoked the common law of trusts to define the general scope of [plan fiduciaries'] authority and responsibility." 472 U.S. at 570. And just as the common law of trusts is relevant in assuring that the responsibilities of plan fiduciaries are not given too narrow a compass, we take it that the common law of trusts is relevant in assuring "ready access to the Federal courts" on behalf of those whose well-being and security Congress wished to protect. Under the common law of trusts, to repeat, abatement of an action commenced by a trustee in his fiduciary capacity is not favored when the trustee leaves office and a successor trustee is available to be substituted as plaintiff.

If abatement of the action commenced by Gary Corbin as a fiduciary is difficult to square with the policies of the common law and the policies adopted by Congress in ERISA, it is equally difficult to square with the policies embodied in the Federal Rules of Civil Procedure.

(Cont'd)

The defendants do, however, vigorously assert that the interests of the plan participants and beneficiaries are not being prejudiced here because the plaintiffs' claims have never had any merit. But the district court did not have occasion to rule on the defendants' motion for summary judgment, and, given the present posture of the case, this court is obviously in no position to address the merits. The only question before us now is whether the district court erred in granting the defendants' motion to dismiss for lack of jurisdiction over the subject matter. We intimate no opinion, of course, as to how the merits of the case should ultimately be decided.

Although the plaintiff in this case ceased to be a real party in interest as of December 20, 1991, and thus had no standing to prosecute the action after that date, Rule 17(a) provides that "[n]o action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until *a reasonable time has been allowed* after objection for . . . joinder or substitution of, the real party in interest; *and such . . . joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.*" (Emphasis supplied.) Here the motion to substitute the successor trustee as plaintiff was filed only three working days (five calendar days) after the defendants' objection to the predecessor trustee's standing — and three or five days, in this context, was hardly unreasonable.

It is true, as the district court said in its oral decision, that a procedural rule cannot be used to restore jurisdiction once it is lost. But subject matter jurisdiction was not irretrievably lost the moment Gary Corbin resigned his trusteeship, and "[s]ubject matter jurisdiction, once it validly exists among the original parties, remains intact after substitution." *Ransom v. Brennan,* 437 F.2d 513, 516 (5th Cir.), *cert. denied,* 403 U.S. 904 (1971). As the Fifth Circuit said in *Ransom,* citing Chief Justice Marshall's opinion in *M'Knight v. Craig's, Adm'r,* 10 U.S. (6 Cranch) 183, 187 (1810), "[a] substituted party steps into the same position of the original party." *Id.*

When a successor fiduciary steps into the shoes of a predecessor who, acting in a fiduciary capacity, has brought a lawsuit in a court vested with jurisdiction over the subject matter of the suit, the "stepping in" relates back to the time when the original party had standing to sue. No other conclusion is possible, given the statement in Rule 17(a) that "substitution

shall have the same effect as if the action had been commenced in the name of the real party in interest."[3]

The relation back doctrine has likewise been adopted in Rule 15(c): "An Amendment of a pleading relates back to the date of the original pleading when . . . (2) the claim . . . asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth . . . in the original pleading . . . ." If in the case at bar the district court had granted the motion to substitute the successor trustee as plaintiff *vice* the original trustee, therefore, the amendment naming the new plaintiff would necessarily have related back to the date of the original complaint. Relation back would have occurred, under Rule 15(c)(2), because the claim being asserted would not have been changed.

Rule 15(a) provides that leave to amend "shall be freely given when justice so requires." Justice does so require in this case — at least it does if Congress meant what it said in the findings and declaration of policy enacted into law with the adoption of ERISA.

The order of dismissal is REVERSED, and the case is REMANDED to the district court with instructions to grant the motion for substitution.

---

3. Although Rule 17(a) requires that every action be prosecuted in the name of the real party in interest, the rule also provides that a trustee, or a party authorized by statute, may sue in that person's own name without joining the party for whose benefit the action is brought.

Appendix A

ANTHONY J. CELEBREZZE, Circuit Judge, dissenting. I have no quarrel with the majority's position that ERISA provides no automatic rule of abatement for suits upon the resignation of trustee plaintiffs. Likewise, I do not take issue with the majority's lengthy recitation of hornbook trust law. I respectfully dissent solely on procedural grounds. I do not believe the proper question is whether ERISA mandates automatic abatement, but rather whether the plaintiff's lack of standing during the pendency of this action deprived the district court of subject matter jurisdiction. I believe that it did. I do not, however, suggest that the action had to automatically cease, regardless of the circumstances, upon the trustee's resignation.

In the instant case, I would style the issues thusly: 1) though plaintiff properly commenced his action while he was a fiduciary, could he proceed with the action after the effective date of his resignation; and 2) could a successor trustee be substituted for the former trustee after his resignation for the purpose of recapturing standing to proceed with the action.

With regard to the first issue, it is axiomatic that "[a] plaintiff must maintain standing throughout all stages of his litigation." *City Communications, Inc. v. City of Detroit,* 888 F.2d 1081, 1086 (6th Cir. 1989), *citing Karcher v. May,* 484 U.S. 72, 78-81 (1987). A trustee is a fiduciary with a right to bring suit as described by ERISA § 502, 29 U.S.C. § 1132. *Thiokol Corp. v. Dep't of Treasury, State of Michigan, Revenue Division,* 987 F.2d 376, 380 (6th Cir. 1993); *Chemung Canal Trust Co. v. Sovran Bank/ Maryland,* 939 F.2d 12, 14 (2nd Cir. 1991), *cert. denied,* 112 S. Ct. 3014 (1992). *See Sec'y of Dep't of Labor v. King,* 775 F.2d 666, 668 (6th Cir. 1985). It follows logically that a former fiduciary has no standing to commence such an action because a former trustee no longer has an interest in the fund. *Chemung*

Canal Trust Co. v. Sovran Bank/Maryland, 939 F.2d at 14-15. As the majority concedes, the plaintiff in the instant case lost his standing upon the effective date of his resignation as trustee. This must be so because a former trustee is no longer a fiduciary,[1] and 29 U.S.C. 1132(a)(3) requires the action to be maintained by a fiduciary. Thus, plaintiff's lack of standing deprived the district court of subject matter jurisdiction. *Flournoy v. Trust Company of Columbus (In re Weaver),* 632 F.2d 461, 463-464 n.6 (5th Cir. 1980). *See American Federation of Gov't Employees v. United States Dep't of Justice,* 738 F.2d 742, 748 (6th Cir. 1984). Moreover, parties cannot stipulate to or waive issues of jurisdiction. *Flournoy v. Trust Company of Columbus (In re Weaver),* 632 F.2d at 463-464 n.6; *United States v. Blanco,* 844 F.2d 344, 349, n.4 (6th Cir. 1988), *cert. denied,* 486 U.S. 1046 (1988); *Agrashell, Inc. v. Hammons Products Co.,* 352 F.2d 443, 447 (8th Cir. 1965). Thus, though plaintiff properly commenced his action while he was a fiduciary, he could not proceed with the action after the effective date of his resignation.

We next consider whether a successor trustee could be substituted for the former trustee after his resignation for the purpose of recapturing standing to proceed with the action. FED. R. Civ. P. 25(c) provides for the substitution of parties upon transfer of interest:

> In the case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party . . . .

---

1. *See Chemung Canal Trust Co. v. Sovran Bank/Maryland,* 939 F.2d 12, 14 (2nd Cir. 1991), *cert. denied,* 112 S. Ct. 3014 (1992).

Appendix A

A district court may, in its sound discretion, substitute a party where a transfer of interest has occurred. *Bamerilease Capital Corp. v. Nearbury,* 958 F.2d 150, 154 (6th Cir. 1992), *cert. denied,* 113 S. Ct. 194 (1992); *Bauer v. Commerce Union Bank, Clarksville, Tenn.,* 859 F.2d 438, 441 (6th Cir. 1988), *cert. denied,* 489 U.S. 1079 (1989); *Otis Clapp & Son, Inc. v. Filmore Vitamin Co.,* 754 F.2d 738, 743 (7th Cir. 1985); *Prop-Jets, Inc. v. Chandler,* 575 F.2d 1322, 1324 (10th Cir. 1978).

I take issue with the majority opinion because I do not believe that a transfer of interest automatically necessitates the substitution of parties in all cases. *See Bamerilease Capital Corp. v. Nearburg,* 958 F.2d at 154; *Bauer v. Commerce Union Bank, Clarksville, Tenn.,* 859 F.2d at 441. Giving a court discretion to substitute a successor interest is vastly different from saying that the court must, upon transfer of interest, substitute the successor party. Normally, upon a transfer of interest, Fed. R. Civ. P. 25(c) has no effect upon the continuation of an action even where the court, in its discretion, rejects a substitution.[2] In the instant case, however, the action simply could not proceed because the plaintiff had lost standing to continue as of the effective date of his resignation from the board of trustees. Plaintiff lost standing specifically because, as a former fiduciary, he no longer had an interest in or ties to the fund. *Chemung Canal Trust Co. v. Sovran Bank/Maryland,* 939 F.2d at 15. Thus, plaintiff no longer had any interest to transfer at the time he moved the court for substitution. Since a substituted party steps into the shoes of the predecessor party, the successor trustee also lacked standing to proceed with the action. *Ransom v. Brennan,* 437 F.2d 513, 516 (5th Cir. 1971), *cert. denied,* 403 U.S. 904 (1971). *See Anspec Co. v. Johnson*

2. Fed. R. Civ. P. 25(c) states: "In case of transfer of interest, the action may be continued by or against the original party, unless the court . . . directs the person to whom the interest is transferred to be substituted.

Controls, Inc., 922 F.2d 1240, 1247 (6th Cir. 1991). Thus, the substitution in this case could not, and did not, cure the jurisdictional defect.

I likewise note that a trial court is obliged to evaluate standing at the time it is challenged. *City Communications, Inc. v. City of Detroit,* 888 F.2d at 1086, *citing Golden v. Zwickler,* 394 U.S. at 108-110. In the instant case, the defendants challenged plaintiff's standing in their motion to dismiss dated March 19, 1992. Plaintiff resigned on December 20, 1991 and Gard was appointed his successor on February 25, 1992. Plaintiff, however, did not attempt to cure his lack of standing until he filed the motion to substitute on March 24, 1992, five calendar days after defendants' motion to dismiss for lack of standing and three months after the effective date of his resignation. Thus, on the date defendants challenged plaintiff's standing in the motion to dismiss, the plaintiff did not have standing to proceed. The majority makes much of its belief that a five day period to cure standing is not unreasonable. I am unaware, however, of any reasonableness exemption which would provide jurisdiction for a plaintiff without standing to proceed with a case for three months without any attempt to cure the defect.

The majority focuses on the fact that Corbin was empowered to bring his suit as an ERISA § 502, 29 U.S.C. § 1132(a)(3) fiduciary.[3] The majority concedes, however, as does Corbin, that he was no longer an ERISA § 502, 29 U.S.C. § 1132 fiduciary as of the effective date of his resignation from the pension plan

---

3. 29 U.S.C. § 1132(a)(3) provides: "A civil action may be brought by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of the subchapter or the terms of the plan;" . . .

board. Accordingly, the district court, upon motion of the defendants, dismissed plaintiff's suit pursuant to Fed. R. Civ. P. 12(b)(1) and (h)(3), which provide dismissal for lack of subject matter jurisdiction upon suggestion of a party. A district court is compelled to dismiss a suit, upon suggestion of a party or otherwise, over which, as here, it does not entertain subject matter jurisdiction at the time of the challenge. *Trent Realty Associates v. First Federal Savings & Loan Ass'n of Philadelphia,* 657 F.2d 29, 36 (3rd Cir. 1981); *Rauch v. Day & Night Manufacturing Corp.,* 576 F.2d 697, 701 (6th Cir. 1978). Thus, the district court clearly did not err by dismissing the plaintiff's claim for lack of subject matter jurisdiction as it was obliged to do.

The majority also promotes a novel theory that ". . . subject matter jurisdiction was not irretrievably lost the moment Gary Corbin resigned his trusteeship, and '[s]ubject matter jurisdiction, once it validly exists among the original parties, remains intact after substitution.' " Majority opinion p. 9, quoting *Ransom v. Brennan,* 437 F.2d 513, 516 (5th Cir.), *cert. denied,* 403 U.S. 904 (1971).

The majority, however, mistakenly fails to acknowledge that the language of *Ransom* clearly requires that subject matter jurisdiction remains intact after substitution only where it already "validly exists." In the instant case, there was no subject matter jurisdiction to preserve at the time the substitution was attempted. The majority attempts to circumvent this problem by its use of what it terms the "relation back" doctrine to contrive jurisdiction. There is no dispute that "[a] substituted party steps into the same position as the original party." *Ransom v. Brennan,* 437 F.2d at 516. The majority, however, opines that the " 'stepping in' relates back to the time when the original party had standing to sue." Majority opinion pp. 9-10.

Though the majority applies its "relation back" doctrine to the case at bar, my research reveals that the doctrine appears to be used exclusively in the context of Fed. R. Civ. P. 15 amendments to pleadings. See *Allgeier v. United States,* 909 F.2d 869, 872 (6th Cir. 1990); *United States v. Casualty and Surety,* 359 F.2d 521, 523 (6th Cir. 1966). The majority provides no authority supporting the use of that doctrine in the context of Rule 17 or 25 substitutions.

The "relation back" doctrine is used in the context of Fed. R. Civ. P. 15 amendments of pleadings. It is logical that when pleadings are amended, the amendments must necessarily "relate back" to the original pleadings. Conversely, the majority's assertion that the "relate back" doctrine has been adopted by Fed. R. Civ. P. 17 is completely unsubstantiated. The Fed. R. Civ. P. 17(a) mandate that substitution "shall have the same effect as if the action had been commenced in the name of the real party in interest" tells us nothing about "relating back" questions of jurisdiction.

Rather, the question in this case focuses on the substitution of a successor trustee pursuant to Fed. R. Civ. P. 25(c). The majority fails to provide any support for the proposition that the Fed. R. Civ. P. 15 "relate back" doctrine must, or even should, apply to Fed. R. Civ. P. 25 substitutions. I feel that the application of the relation back doctrine to jurisdictional determinations is a dangerous course which will create a plethora of problems in the judicial process. Logically, if every jurisdictional problem could be cured by relating the successor's standing to the commencement of the suit, there would be no need for rules delineating the time and manner of substitutions. Thus, by adopting the position of the majority, we undermine the integrity of the judiciary to determine its own jurisdiction by transferring

to the parties the power to manufacture and recapture jurisdiction at will.

While the majority may not fully agree with the district court's determination, it does not necessarily follow that the district court abused its discretion by denying plaintiff's motion to substitute.[4] A district court abuses its discretion where it improperly applies the law or uses an erroneous legal standard. *Black Law Enforcement Officers Ass'n v. City of Akron,* 824 F.2d 475, 479 (6th Cir. 1987). A district court can be found to have abused its discretion when the reviewing court is firmly convinced that a mistake has been made. *In re Bendectin,* 857 F.2d 290, 307 (6th Cir. 1988), *cert. denied,* 488 U.S. 1006 (1989). It is difficult to believe a mistake has certainly been made by the district court where there is no express authority to refute the district court's action. Accordingly, I would find that the district court did not abuse its discretion with its implicit denial of plaintiff's motion to substitute.

This court must review a district court's Fed. R. Civ. P. 12(b)(1) or 12(h)(3) dismissal for lack of subject matter jurisdiction *de novo. Ynclan v. Dep't of the Air Force,* 943 F.2d 1388, 1390 (5th Cir. 1991); *Willis v. Sullivan,* 932 F.2d 390, 395 (6th Cir. 1991). *A de novo* review of the propriety of the district court's ruling requires this court to consider the merits of the motion anew and in its entirety. *Choctaw Nation v. United States,* 119 U.S. 1, 30 (1886). My *de novo* review compels me to conclude that plaintiff's lack of standing deprived the district court of jurisdiction to hear his case. There is no authority for the proposition that the court had any obligation to "relate back" to the date plaintiff originally commenced suit in determining

4. The district court's dismissal of the action for lack of standing implicitly denied plaintiff's motion to substitute.

jurisdiction at the time of the challenge. Conversely, I would find the district court did not abuse its discretion by dismissing this action because the plain language of Fed. R. Civ. P. 12 obliged it to do so.

I would AFFIRM the judgment of the district court.

Appendix A

BOYCE F. MARTIN, JR., Circuit Judge, dissenting. I join in Judge Celebrezze's dissent, but write separately to note my own troubled belief that ERISA is a separate and distinct statutory scheme. Traditionally, the substitution of a party always has been the preferred method of reflecting a change in the named party who represented the interests of others. If the change in this case had taken place immediately upon the removal of one trustee and the concurrent substitution of another trustee, I would accept the argument advanced by the majority. However, that was not the case here. Mr. Corbin resigned on December 20, 1991. He was not replaced by Mr. Gard until February 25, 1992, a passage of some two months. To me this is not substitution, but resurrection. The difficulty I have with cases like this one is that they involve the potential expiration of a statute of limitations, and an uncertain benefit for employees who were the intended beneficiaries of the insurance plan in question. Under these circumstances, a stricter reading of the ERISA statute is warranted. To me, substitution means substitution, not postponement. The majority has itself distinguished the case of *Blackmar v. Lichtenstein,* 578 F.2d 1273 (8th Cir. 1978), upon which it relies, and in which substitution by a successor trustee was allowed. In that case, unlike here, the departing trustee did not resign, nor was he relieved of responsibility in the litigation until after the successor trustee was appointed.

To me, at least, this case should be remanded to the district court for a determination of precisely what transpired, and who authorized the substitution of the successor trustee. I believe that the record, insofar as these issues are concerned, is totally devoid of support for the conclusion reached by the majority. I therefore respectfully dissent.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED AUGUST 2, 1993

No. 92-1540

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GARY CORBIN,

Plaintiff-Appellant,

v.

KARL BLANKENBURG; JOHN CRUZ; CHARLES FURLOTTE; ROBERT KUSCHEL; JOSEPH LAUGHHUNN; ROBERT LEDBETTER; DAVID MARGOLIS; DAVID MCEACHIN; ROBERT STEPHENS; JEROME WILSON; ROBERT UDELL, Present or Former Trustees of the Pattern & Model Makers Association of Warren & Vicinity Pension Fund (Defined Benefit); MID-CONTINENTAL CLAIM SERVICE AND ADMINISTRATORS, INC.; GARY NOVARA; and LAURENCE BRESKIN,

Defendants-Appellees.

ON APPEAL from the United States District Court for the Eastern District of Michigan

Decided and Filed August 2, 1993

Before: KEITH and NELSON, Circuit Judges; and CELEBREZZE, Senior Circuit Judge.

Appendix B

CELEBREZZE, Senior Circuit Judge, delivered the opinion of the court, in which KEITH, Circuit Judge, joined. NELSON, Circuit Judge (pp. 9-12), delivered a separate dissenting opinion.

CELEBREZZE, Anthony J., Senior Circuit Judge. Plaintiff, Gary Corbin, appeals the district court's dismissal of his ERISA action against defendants, present and former trustees of the Pattern & Model Makers Association of Warren and Vicinity Pension Fund ("the pension fund"). The plaintiff, in his capacity as a trustee and fiduciary of the pension fund, brought suit against defendants, alleging various breaches of fiduciary responsibilities in violation of ERISA § 404(a)(1)(A) through (D), 29 U.S.C. § 1105. The district court dismissed the suit, upon motion of the defendants, on the basis that plaintiff lacked standing to proceed with the action.

Plaintiff, as a trustee of the pension fund, filed the ERISA action on May 30, 1991. On November 26, 1991, for reasons unrelated to his claims, plaintiff resigned his position as trustee, effective December 20, 1991. Plaintiff, however, continued to prosecute the suit, filing discovery motions and answering defendants' motion for summary judgment.

On February 25, 1991, Paul Gard was appointed trustee for the pension fund, succeeding the plaintiff.[1] A few weeks later, on March 19, 1992, defendants filed a motion to dismiss plaintiff's suit, pursuant to FED R. CIV. P. 12(b)(1) and 12(h)(3), for lack of subject matter jurisdiction. Defendant's motion charged that,

---

1. Defendants contend that, because there were two vacancies on the pension fund's board of trustees at the time Gard was appointed, Gard did not specifically replace plaintiff. The only evidence in the record on this point is an affidavit by Gard which states that he took plaintiff's position as trustee.

because plaintiff resigned from his position as trustee, he was no longer a proper party to continue prosecuting the suit, pursuant to ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3). Five days later, on March 24, 1992, plaintiff attempted to cure his acknowledged standing problem by filing a FED. R. CIV. P. 25(c) motion to add/substitute his successor trustee, Paul Gard, as plaintiff to the action. With both motions before it, the court ordered dismissal of the action for lack of subject matter jurisdiction on March 19, 1992.

Plaintiff now appeals, raising two assignments of error which challenge the court's dismissal for lack of subject matter jurisdiction, as well as the court's purportedly arbitrary denial of his motion to add/substitute a party for the purpose of curing the jurisdictional defect.

For the reasons which follow, this court finds the plaintiff's challenge to be meritless.

The plaintiff avers that the district court improperly dismissed his action for lack of subject matter jurisdiction and arbitrarily denied his motion to add/substitute successor trustee Gard as a party plaintiff.

This court must review a district court's FED. R. CIV. P. 12(b)(1) and 12(h)(3) dismissal for lack of subject matter jurisdiction *de novo. Ynclan v. Dep't of the Air Force,* 943 F.2d 1388, 1390 (5th Cir. 1991); *Willis v. Sullivan,* 931 F.2d 390, 395 (6th Cir. 1991). A *de novo* review of the propriety of the district court's ruling requires this court to consider the merits of the motion anew and in its entirety. *Choctaw Nation v. United States,* 119 U.S. 1, 30 (1886). As previously noted, five days after defendants moved the court for dismissal, the plaintiff moved the

court to add/substitute successor trustee Gard as a party plaintiff. Plaintiff did this to cure the jurisdictional defect alleged by the defendants. Corbin asserts that, when he brought the suit, he was empowered to do so as an ERISA § 502, 29 U.S.C. § 1132(a)(3) fiduciary.[2] He concedes that he was no longer an ERISA § 502, 29 U.S.C. § 1132 fiduciary as of the effective date of his resignation from the pension plan board. Corbin argues that, upon the appointment of Gard as his successor on the board, plaintiff's interest in the proceeding was automatically transferred to Gard, thereby necessitating the substitution of Gard as plaintiff.

The defendants, however, charge that upon the date plaintiff effectively ceased to be a fiduciary, the district court lost jurisdiction over the matter and so could not substitute Gard as plaintiff. The defendants further maintain that plaintiff never had standing to bring the action because plaintiff was not a fiduciary as defined by ERISA § 502, 29 U.S.C. § 1132(a)(3). Defendants instead assert that plaintiff brought the action personally on behalf of the corporation in his capacity as a trustee.

A trustee is a fiduciary with a right to bring suit as described by ERISA § 502, 29 U.S.C. § 1132. *Thiokol Corp. v. Dep't of Treasury, State of Michigan, Revenue Division*, 987 F.2d 376, 380 (6th Cir. 1993); *Chemung Canal Trust Co. v. Sovran Bank/ Maryland*, 939 F.2d 12, 14 (2nd Cir. 1991), *cert. denied*, 112 S. Ct. 3014 (1992). *See Sec'y of Dep't of Labor v. King*, 775 F.2d 666, 668 (6th Cir. 1985). If follows logically that a former fiduciary has no standing to commence such an action because a

---

2. 29 U.S.C. § 1132(a)(3) provides: "A civil action may be brought by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of the subchapter or the terms of the plan; . . ."

former trustee no longer has an interest in the fund. *Chemung Canal Trust Co. v. Sovran Bank/Maryland,* 939 F.2d at 14-15. Thus, in the instant case, the issues become: 1) though plaintiff properly commenced his action while he was a fiduciary, could he proceed with the action after the effective date of his resignation; and 2) could a successor trustee be substituted for the former trustee for the purpose of recapturing standing to proceed with the action.

We resolve the first issue against the plaintiff. This court has held that "[a] plaintiff must maintain standing throughout all stages of his litigation." *City Communications, Inc. v. City of Detroit,* 888 F.2d 1081, 1086 (6th Cir. 1989), *citing Karcher v. May,* 484 U.S. 72, 78-81 (1987); *Golden v. Zwickler,* 394 U.S. 103, 108-110, (1969). The plaintiff in the instant case lost his standing upon the effective date of his resignation as trustee. This is so because a former trustee is no longer a fiduciary,[3] and 29 U.S.C. § 1132(a)(3) requires the action to be maintained by a fiduciary. Thus, plaintiff's lack of standing deprived the district court of subject matter jurisdiction. *Flournoy v. Trust Company of Columbus (In re Weaver),* 632 F.2d 461, 463-464 n.6 (5th Cir. 1980). *See American Federation of Gov't Employees v. United States Dep't of Justice,* 738 F.2d 742, 748 (6th Cir. 1984). Parties cannot stipulate to or waive issues of jurisdiction. *Flournoy v. Trust Company of Columbus (In re Weaver),* 632 F.2d at 463-464 n.6; *United States v. Blanco,* 844 F.2d 344, 349, n.4 (6th Cir. 1988), *cert. denied,* 486 U.S. 1046 (1988); *Agrashell, Inc. v. Hammons Products Co.,* 352 F.2d 443, 447 (8th Cir. 1965).

A trial court is obliged to evaluate standing at the time it is

---

3. *See Chemung Canal Trust Co. v. Savran Bank/Maryland,* 939 F.2d 12, 14 (2nd Cir. 1991), *cert. denied,* 112 S. Ct. 3014 (1992).

challenged. *City Communications, Inc. v. City of Detroit,* 888 F.2d at 1086, *citing Golden v. Zwickler,* 394 U.S. at 108. In the instant case, the defendants challenged plaintiff's standing in their motion to dismiss dated March 19, 1992. Plaintiff did not attempt to cure his standing until he filed the motion to substitute on March 24, 1992. Thus, on the date defendants challenged plaintiff's standing, the plaintiff did not have standing to proceed.

Upon motion of the defendants, the district court dismissed plaintiff's suit pursuant to FED. R. CIV. P. 12(b)(1) and (h)(3), which provide for dismissal for lack of subject matter jurisdiction upon suggestion of a party. A district court is compelled to dismiss a suit, upon suggestion of a party or otherwise, over which it does not entertain subject matter jurisdiction at the time of the challenge. *Trent Realty Associates v. First Federal Savings & Loan Ass'n of Philadelphia,* 657 F.2d 29, 36 (3rd Cir. 1981); *Rauch v. Day & Night Manufacturing Corp.,* 576 F.2d 697, 701 (6th Cir. 1978). Thus, we find the district court did not err by dismissing the plaintiff's claim for lack of subject matter jurisdiction.

We now turn to the issue of whether a successor trustee can be substituted for a former trustee for the purpose of recapturing the requisite standing to proceed with an action.

FED R. CIV. P. 25(c) provides for the substitution of parties upon transfer of interest:

> In the case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. . . .

Appendix B

Plaintiff contends that, as of the date in February when Gard was appointed his successor trustee, plaintiff's interest was transferred to Gard. Thus, plaintiff asserts that the district court should have substituted Gard as party plaintiff.

The district court has the sound discretion to substitute a party where a transfer of interest has occurred. *Bamerilease Capital Corp. v. Nearbury,* 958 F.2d 150, 154 (6th Cir. 1992), *cert. denied,* 113 S. Ct. 194 (1992); *Bauer v. Commerce Union Bank, Clarksville, Tenn.,* 859 F.2d 438, 441 (6th Cir. 1988), *cert. denied,* 489 U.S. 1079 (1989); *Otis Clapp & Son, Inc. v. Filmore Vitamin Co.,* 754 F.2d 738, 743 (7th Cir. 1985); *Prop-Jets, Inc. v. Chandler,* 575 F.2d 1322, 1324 (10th Cir. 1978). A transfer of interest, however, does not require the substitution of parties. *See Bamerilease Capital Corp. v. Nearburg,* 958 F.2d at 154; *Bauer v. Commerce Union Bank, Clarksville, Tenn.,* 859 F.2d at 441. Normally, upon a transfer of interest, FED. R. CIV. P. 25(c) has no effect upon the continuation of an action even where the court, in its discretion, rejects a substitution.[4] In the instant case, however, the action could not proceed because the plaintiff had lost standing to continue as of the effective date of his resignation from the board of trustees. Plaintiff lost standing specifically because, as a former fiduciary, he no longer had an interest in or ties to the fund. *Chemung Canal Trust Co. v. Sovran Bank/ Maryland,* 939 F.2d at 15. Thus, plaintiff no longer had an interest to transfer at the time he moved the court for substitution. Since a substituted party steps into the shoes of the predecessor party, Gard would also lack standing to proceed with the action. *Ransom v. Brennan,* 437 F.2d 513, 516 (5th Cir. 1971), *cert.*

---

4. FED. R. CIV. P. 25(c) states: "In case of transfer of interest, the action may be continued by or against the original party, unless the court . . . directs the person to whom the interest is transferred to be substituted. . ."

denied, 403 U.S. 904 (1971). *See Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1247 (6th Cir. 1991). Thus, the substitution could not cure the jurisdictional defect.

A district court abuses its discretion where it improperly applies the law or uses an erroneous legal standard. *Black Law Enforcement Officers Ass'n v. City of Akron*, 824 F.2d 475, 479 (6th Cir. 1987). A district court can be found to have abused its discretion when the reviewing court is firmly convinced that a mistake has been made. *In re Bendectin*, 857 F.2d 290, 307 (6th Cir. 1988), *cert. denied*, 488 U.S. 1006 (1989). This court finds that the district court did not err with its implicit denial of the motion to substitute.[5] Likewise, we find the district court did not abuse its discretion by dismissing the action for lack of standing.

The judgment of the district court is hereby AFFIRMED.

---

5. The district court's dismissal of the action for lack of standing implicitly denied plaintiff's motion to substitute.

Appendix B

DAVID A. NELSON, Circuit Judge, dissenting. I agree that the plaintiff would have had no standing to bring this suit subsequent to the effective date of his resignation. See *Chemung Canal Trust Co. v. Sovran Bank/Maryland,* 939 F.2d 12 (2d Cir. 1991), *cert. denied,* 112 S. Ct. 3014 (1992); *Blackmar v. Lichtenstein,* 603 F.2d 1306 (8th Cir. 1979). The suit was commenced well before the plaintiff resigned, however. Assuming, as we must, that the plaintiff was acting as a trustee in bringing the action, the interest he possessed as trustee on May 30, 1991, the date on which the complaint was filed, clearly gave him standing at that point. See 29 U.S.C. § 1132(a)(3) (suit for equitable relief under ERISA may be brought by a fiduciary). *Cf.* Rule 17(a), FED. R. CIV. P. (trustees of express trusts may sue in their own names without joining trust beneficiaries).

In its oral ruling on the defendants' motion to dismiss, the district court indicated that it had "no quarrel" with the proposition that "subject matter jurisdiction exists." The real question, as the district court saw it, was not whether jurisdiction had existed, but whether the action could be allowed to continue "unabated," in the court's word, once the trustee had resigned his office. Citing *Hilbrands v. Far East Trading Co.,* 509 F.2d 1321 (9th Cir. 1975), for the proposition that the survivability of any right of action depends on substantive law and not on Rule 25, FED. R. CIV. P., the district court held as a matter of substantive law that a suit properly brought by an ERISA trustee is automatically abated when the trustee leaves office and cannot be revived in the name of a successor trustee.

I know of no authority that supports this surprising conclusion. It is hornbook law, on the contrary, that an action brought by a trustee "is *not* ordinarily abated by his failure to continue in office." 1 C.J.S., Abatement and Revival § 111(a)

(emphasis supplied). When a trustee party leaves office, "the action is ordinarily revived in the name of the successor." 1 Am. Jur. 2d, Abatement, Survival, and Revival § 123. And the holding that an ERISA action abates without possibility of revival upon the resignation of a plaintiff trustee simply cannot be squared, in my view, with the substantive policies declared by Congress in 29 U.S.C. § 1001. See, *e.g.*, § 1001(b), declaring it to be the policy of ERISA "to protect . . . the interests of participants in employee benefit plans and their beneficiaries, by . . . establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, *and ready access to the Federal courts.*" (Emphasis supplied.)

It seems to me that the district court's holding is also impossible to square with the policies embodied in the Federal Rules of Civil Procedure. Although the plaintiff in this case ceased to be a real party in interest as of December 20, 1991, and thus had no standing to prosecute the action after that date, Rule 17(a) provides that "[n]o action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until *a reasonable time has been allowed* after objection for . . . joinder or substitution of, the real party in interest; *and such . . . joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.*" (Emphasis supplied.) In the case before us, the motion to substitute the successor trustee as plaintiff was filed only five days after the defendants' objection to the predecessor trustee's standing — and five days, in this context, was hardly unreasonable.

Citing *Ransom v. Brennan*, 437 F.2d 513 (5th Cir.), *cert. denied*, 403 U.S. 904 (1971), my colleagues on the panel suggest

that because "a substituted party steps into the shoes of the predecessor party," the joinder or substitution of the successor trustee could not cure the problem that arose when the original trustee resigned. I agree that the substituted party steps into the shoes of the predecessor party, but nothing in *Ransom* or in *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240 (6th Cir. 1991), the other decision cited in this connection, suggests that the "stepping in" cannot relate back in time to a point when the predecessor party still had a sufficient interest to confer standing.

Our decision in *City Communications, Inc. v. Detroit,* 888 F.2d 1081 (6th Cir. 1989), although it does not cite the relation back doctrine, is entirely consistent with the doctrine. In *City Communications* the charter of a corporate plaintiff had been revoked for failure to file annual reports and pay filing fees. We held that the "temporary revocation of [the corporate plaintiff's] charter does not deprive [the] party of standing." *Id.* at 1088. The result thus reached is identical to that which would have been reached had we said in so many words that reinstatement of the revoked charter relates back to a time prior to revocation.

The relation back doctrine has clearly been adopted in Rule 17(a), FED. R. CIV. P. Substitution of the real party in interest, that rule says, "shall have the same effect as if the action had been commenced in the name of the real party in interest." The relation back doctrine has likewise been adopted in Rule 15(c): "An amendment of a pleading relates back to the date of the original pleading when . . . (2) the claim . . . asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth . . . in the original pleading. . . ."

If in the case at bar the district court had granted the motion to substitute the successor trustee as plaintiff *vice* the original

trustee, the amendment naming the new plaintiff would necessarily have related back to the date of the original complaint. Relation back would have occurred, under Rule 15(c)(2), because the claim being asserted would not have been changed. Leave to amend "shall be freely given when justice so requires," Rule 15(a) provides, and it seems to me that justice does so require in this case — at least it does if Congress meant what it said in the findings and declaration of policy adopted at the beginning of ERISA.

I am firmly convinced that the district court made a mistake in denying the motion to substitute. I would therefore reverse the order of dismissal and remand the case with instructions to let the matter go forward in the name of the trustee who is now the real party in interest.

APPENDIX C — JUDGMENT AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION FILED MARCH 31, 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CASE NO. 91-72595
HON. GEORGE E. WOODS

GARY CORBIN, in his capacity as a Trustee and fiduciary of the Pattern & Model Makers Association of Warren & Vicinity Pension Fund (Defined Benefit)

Plaintiff,

v

KARL BLANKENBURG, et al,

Defendant,

JUDGMENT

AT A SESSION of said Court held in the City of Detroit, State of Michigan held on March 31, 1992.

PRESENT: THE HONORABLE GEORGE E. WOODS
UNITED STATES DISTRICT JUDGE

The Court having issued an Order Granting Defendants' Motion to Dismiss, now, therefore,

Appendix C

IT IS HEREBY ADJUDGED THAT Defendants' Motion to Dismiss Claims of Plaintiff Pursuant to Federal Rules of Civil Procedure 12(b)(1) and (b)(3) [sic] is Granted and Plaintiff's Complaint is Dismissed.

So ordered.

s/ George E. Woods
GEORGE E. WOODS
UNITED STATES DISTRICT JUDGE

Appendix C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No.: 91-CV-72595-DT

Hon. George E. Woods

GARY CORBIN, in his capacity as a Trustee and fiduciary of the Pattern & Model Makers Association of Warren & Vicinity Pension Fund (Defined Benefit),

Plaintiff,

vs.

KARL BLANKENBURG, JOHN CRUZ, CHARLES FURLOTTE, ROBERT KUSCHEL, JOSEPH LAUGHHUNN, ROBERT LEDBETTER, DAVID MARGOLIS, DAVID McEACHIN, ROBERT STEPHENS, JEROME WILSON, ROBERT UDELL, present or former Trustees of the Pattern & Model Makers Association of Warren & Vicinity Pension Fund (Defined Benefit), MID-CONTINENTAL CLAIM SERVICE AND ADMINISTRATORS, INC., GARY NOVARA and LAWRENCE BRESKIN,

Defendants.

ORDER GRANTING DEFENDANTS' MOTION
TO DISMISS CLAIMS OF PLAINTIFF
PURSUANT TO FED. R. CIV. P. 12(b)(1) AND (h)(3)

At a Session of said Court held in Detroit,
Michigan on Mar 31, 1992

PRESENT: HON. GEORGE E. WOODS
U.S. DISTRICT JUDGE

Appendix C

This matter having come before the Court on Defendants' Motion to Dismiss Claims of Plaintiff Pursuant to Fed. R. Civ. P. 12(b)(1) and (h)(3) and the Court having reviewed the Briefs and heard the oral argument of counsel for the respective parties and the Court being fully apprised in the premises, finds as follows:

That as of December 20, 1991, when Plaintiff, Gary Corbin voluntarily resigned his trusteeship, he lost standing as a fiduciary and concurrently, this Court lost subject matter jurisdiction under Section 502 of ERISA, 29 U.S.C. § 1132.

NOW THEREFORE, IT IS HEREBY ORDERED that Defendants' Motion to Dismiss Claims of Plaintiff Pursuant to Fed. R. Civ. P. 12(b)(1) and (h)(3) is GRANTED.

IT IS FURTHER ORDERED that Plaintiff's Complaint is hereby dismissed based upon the Court's loss of subject matter jurisdiction on December 20, 1991.

IT IS SO ORDERED.

s/ George E. Woods
U.S. DISTRICT JUDGE

APPENDIX D — TRANSCRIPT OF PROCEEDINGS DATED MARCH 26, 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 91-CV-72595-DT
Honorable George E. Woods

GARY CORBIN, in his capacity as a Trustee and fiduciary of the Pattern & Model Makers' Association of Warren & Vicinity Pension Fund (Defined Benefit),

Plaintiff,

-vs-

KARL BLANKENBURG, JOHN CRUZ, CHARLES FURLOTTE, ROBERT KUSCHEL, JOSEPH LAUGHHUNN, ROBERT LEDBETTER, DAVID MARGOLIS, DAVID McEACHIN, ROBERT STEVENS, JEROME WILSON, ROBERT UDELL, present and former Trustees of the Pattern Model Makers' Association of Warren & Vicinity Pension Fund (Defined Benefit) and MID-CONTINENTAL CLAIM SERVICE AND ADMINISTRATORS, INC., GARY NOVARA and LAWRENCE BRESKIN,

Defendants.

Motion

Proceedings had in the above-entitled cause before the HONORABLE GEORGE E. WOODS, United States District

Appendix D

Court Judge, at 272 United States Courthouse, Detroit, Michigan, Thursday, March 26, 1992.

APPEARANCES:

For the Plaintiff:
A. READ CONE, III (P17103)
R. IAN HUNTER (P15279)
ROBERT L. MERCADO (P27783)
Dean & Fulkerson
801 W. Big Beaver, Fifth Floor
Troy, MI 48084
(313) 362-1300

For the Defendants:
LEO NOUHAN (P30763)
LORREY COCHRAN (P32293)
RONALD A. WEGLARZ (P33357)
Novara, Tesija & Nouhan, P.C.
2000 Town Center, Suite 2370
Southfield, Michigan 48075-1314
(313) 354-0380

[3] Detroit, Michigan
Thursday, March 26, 1992

* * *

THE COURT: Corbin versus Blankenburg.

MR. NOUHAN: Ready, your Honor.

MR. CONE: Ready, your Honor.

Appendix D

THE COURT: I want you to address the plaintiff's [sic] motion to dismiss.

Who is addressing Defendants' motion?

MR. NOUHAN: Leo Nouhan, your Honor, appearing on behalf of the defendants.

THE COURT: Be brief, Counsel, be merciful.

MR. NOUHAN: I will, your Honor.

Essentially the basis for the motion to dismiss is founded upon Plaintiff Gary Corbin's loss of standing in [sic] the concurrent loss of subject matter jurisdiction by this Court pursuant to Section 502 of ERISA, which is 29 U.S.C. 1132. Clearly based upon the plethora of case law that we have provided to the Court, we feel that the law is clear, that a plaintiff, in order to have standing under ERISA, and the Court, in order to have subject matter jurisdiction under ERISA for the case, the nature of which is presently before the Court, that the requirements and mandates of Section 1132 must be met: Namely that the case is limited to the persons specifically enumerated in the statute. It [4] is our opinion, and it is unrebutted by the plaintiff in this case, totally unrebutted that Mr. Corbin is no longer a trustee and Mr. Corbin no longer has standing.

The plaintiff in this case has offered no rebuttal to our argument that the Court has lost subject matter jurisdiction Instead, what the plaintiff has chosen to do is to move pursuant to Rule 25(c) to substitute a new plaintiff to stand in the shoes supposedly of Mr. Corbin in order to proceed.

Would the Court like me to likewise address that argument?

THE COURT: No.

MR. NOUHAN: Basically, your Honor, the facts before this Court are simple. Mr. Corbin, while he qualified —

THE COURT: I know the facts.

MR. NOUHAN: While he qualified as trustee at the time of the filing of this complaint, voluntarily resigned in December, upon his resignation, upon our bringing it to the Court's attention pursuant to the Federal Rules of Procedure, 1203, [sic] the Court has lost subject matter jurisdiction. A plaintiff cannot maintain inaction [sic] an action under ERISA alleging fiduciary breach unless he is one of the four enumerated persons that are specifically stated under the statute. That is, it must be filed by the Secretary of [5] Labor, a fiduciary, a participant or beneficiary. Mr. Corbin no longer fits any of those four categories by any stretch or compression [sic]. He could not fit one of those four persons that are authorized to file suit under ERISA, and because ERISA jurisdiction is intimately connected to standing, the Court has lost subject matter jurisdiction once the plaintiff no longer has standing. We have cited case law to the Court suggesting that standing is something that must be maintained throughout the course of the litigation, specifically the *Barton v. City of Detroit* case. And accordingly, your Honor, since Mr. Corbin no longer has standing, this Court no longer has subject matter jurisdiction under ERISA. Accordingly, the case against the defendant should be dismissed in its entirety.

THE COURT: Thank you.

Appendix D

Counsel.

MR. CONE: Good afternoon. Read Cone, appearing on behalf of Plaintiffs Gary Corbin and Paul Gard.

In response to the motion that Mr. Corbin lacks standing since he is no longer a trustee, we effectively agreed in our research with Defendant's position. However, we believe the addition of Mr. Gard as a plaintiff in this case mooted that issue. Mr. Gard is a recently elected trustee to the fund. Mr. Gard has been familiar with this case and he has asked to join the case as a party plaintiff. [6] He has standing under ERISA, and under Mr. Nouhan's citation as fiduciary of the plan since he is a trustee of the plan. He became a trustee February 25 of this year. There was a vacancy among the employer trustees, starting in June of 1991, which the Board of Trustees elected not to fill, for whatever reason, they apparently made no effort to do so and elections were finally held in January and February of this year. And that is the first time that the vacancy was filled, but for the failure of the defendants and other trustees of the fund at this time, that vacancy should have been filled long ago. That would have been Mr. Gard. Mr. Gard did attempt to become an employer/trustee in 1990 and was barred from doing so by the existing Board of Trustees. So we believe that there would have been continuous representation, and we believe until the Court rules today, there has been continuous representation by Mr. Corbin in this case.

The issue is, at best, a question of his standing. It is not a question of jurisdiction. Thank you.

MR. NOUHAN: Would the Court allow brief rebuttal?

THE COURT: No.

Appendix D

The plaintiff here, who is a former trustee of ERISA benefits pension plan, filed suit alleging breach of fiduciary duty pursuant to the particular statute. The defendants are present and former Plan Trustees as well as [7] well as service providers, including Mid-Continental Claim.

The Plan itself is a defined benefit plan that provides certain pension benefits to participants. The Plan resulted, of course, from the collective bargaining agreement and its negotiations between the Pattern and Model Makers' Association and various employees having collective bargaining agreements with the union. The employers were required to contribute to the plan. A majority of the employers were members of a multi-employer association known as the Michigan Model Manufacturers Association. So, obviously enough, it was subject to the ERISA statute.

Several motions are now pending before the Court, one of which is a motion to dismiss for lack of subject matter jurisdiction. And the Court will address that only today.

Under ERISA, of course, the Federal Court has exclusive jurisdiction over civil actions brought by the Secretary of Labor, a participant, a beneficiary or a plan fiduciary. When Plaintiff filed this suit he was a plan trustee. As such, he had standing to maintain this suit of [sic] a plan fidicuary.

On December 20th of 1991, the plaintiff resigned as trustee of the Pattern and Model Makers' Association of Warren and Vicinity defined pension benefit fund, which is a real mouthful. Accordingly, the defendants assert here [8] that Plaintiff lacks standing to continue this lawsuit and consequently the Court simply does not have subject matter jurisdiction.

Appendix D

Well, under 12(h)(3), as you know, whenever it appears that the Court lacks jurisdiction on the subject matter, the Court shall dismiss the action. Simply that. And the Court must determine jurisdiction before determining the validity of any claims that are brought before it, and that is why the Court ignores today the motion to substitute plaintiffs and the motion for summary judgment by the defendant.

The plaintiff responded to this motion by moving to add or substitute a party plaintiff here pursuant to 25(c), arguing that Paul Gard, a Trustee of the plan from February 1992, will pursue this particular lawsuit. The plaintiff contends, of course, this will facilitate the Court's uninterrupted examination of these allegations.

Well, 25(c) in itself reads as follows, and let the Court quote:

> "In the case of any transfer of interest the action may be continued by the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party."

[9] The plaintiff asserts here that adding or substituting Guard will not adversely affect this lawsuit or the Court's schedule. The plaintiff notes that substitution of a trustee is permissible, referencing the *Blackmar* case out of Missouri, in which the Court held that two replacement trustees would succeed to the rights of the one who was removed. The Court has no quarrel with that.

The Court agrees, of course, Mr. Gard has standing under

ERISA to bring a claim. No quarrel about that. *Blackmar,* however, is not dispositive because the jurisdiction in that case was not permised [sic] on ERISA. If you would refer yourself to that matter.

This Court finds that Rule 25(c) presumes subject matter jurisdiction exists. No quarrel about that. But a procedural rule cannot be used to restore jurisdiction once it is lost. Just as simple as that. Reference yourself to Rule 82, Federal Rules of Civil Procedure. Rule 25(c) allows an action to continue unabated in an action which does survive under substantive law. This one does not. Reference the *Hillbrands* case out of the Ninth Circuit. And we had a case out of the Eastern District of New York. I think it was *Federal Deposit Insurance Company* case.

So, this Court lost subject matter jurisdiction over this case on December 20, 1991. There was no assignment of interest between Corbin and Guard [sic] on that date. Gard wasn't [10] even a trustee as the Court understands, until February.

So Defendants' motion to dismiss is granted. Counsel will present the appropriate order to Ms. Henson at or before one o'clock tomorrow. Thank you, gentlemen.

* * *

Appendix D

[11]REPORTER'SCERTIFICATE

I, BARBARA C. CHATMAN, Official Court Reporter for the United States District Court of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing proceedings were had in the within-entitled and numbered cause on the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

s/ Barbara C. Chatman
BARBARA C. CHATMAN, CSR-0077

Dated: _____

Detroit, Michigan